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16-181

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 577.

SAMUEL OSBORNE, JR., PLAINTIFF IN ERROR,

vs.

THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 23, 1881.

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INDEX.

	Original.	Print.
Petition	1	1
Demurrer to petition	5	3
Opinion of Hon. E. S. Dundy, district judge	12	6
Demurrer sustained	13	7
Judgment	13	7
Writ of error	14	7
Citation	15	8
Stipulation as to transcript for Supreme Court	16	8
Bond	18	9
Clerk's certificate	19	10
Assignment of errors	20	10

1 Pleas before the honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the district last above named, at the term of May, A. D. 1881.

SAMUEL OSBORN, JR.,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

Be it remembered that on the 15th day of June, 1880, there was filed in the said circuit court, with leave of court, by and on behalf of the plaintiff above named, an amended petition, of which the following is the introduction, first cause of action and prayer for relief (as per stipulation of parties), to wit:

2 *Amended petition.*

In the circuit court of the United States for the district of Nebraska.

SAMUEL OSBORN, JR.,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

The plaintiff, Samuel Osborne, jr., complains of The County of Adams, in the State of Nebraska, defendant, and for cause of action alleges:

1. That said plaintiff, Samuel Osborne, jr., is a citizen of the State of Massachusetts, and that the said defendant is a duly organized county within the State of Nebraska, and that the amount in controversy in this action exceeds the sum of five hundred dollars ($500).

2. And plaintiff further alleges that the said County of Adams, defendant, was on the 26th day of November, A. D. 1872, and for a long time prior thereto had been, a duly and legally organized county under the laws of the State of Nebraska, and that the precinct of Juniata therein was at that time, and still is, one of the legal subdivisions of said County of Adams, defendant, and that on said 26th day of November, 1872, the said defendant county did cause to be issued certain bonds on said Juniata Precinct, in said county, in the sum of six thousand dollars ($6,000.00) to aid works of internal improvement in said precinct, to wit, for the purpose of aiding in the construction of a public steam grist mill in said precinct, and that all of said bonds are now owned by this plaintiff, and the same are wholly unpaid.

3rd. And for a third and further cause of action plaintiff says:

3 That on the 26th day of November, 1872, at Juniata, in said county, the said defendants, pursuant to a vote of the qualified electors of said precinct of Juniata, in said county, at an election held in said precinct on the 26th day of November, 1872, did make and issue the bond of said Juniata Precinct, dated on said day, at said place, whereby, for value received, said precinct promised to pay, eighteen years from date, to George W. Moore, or bearer, five hundred dollars, at the National Park Bank, in

1 Pleas before the honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the district last above named, at the term of May, A. D. 1881.

SAMUEL OSBORN, JR.,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

Be it remembered that on the 15th day of June, 1880, there was filed in the said circuit court, with leave of court, by and on behalf of the plaintiff above named, an amended petition, of which the following is the introduction, first cause of action and prayer for relief (as per stipulation of parties), to wit:

2 *Amended petition.*

In the circuit court of the United States for the district of Nebraska.

SAMUEL OSBORN, JR.,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

The plaintiff, Samuel Osborne, jr., complains of The County of Adams, in the State of Nebraska, defendant, and for cause of action alleges:

1. That said plaintiff, Samuel Osborne, jr., is a citizen of the State of Massachusetts, and that the said defendant is a duly organized county within the State of Nebraska, and that the amount in controversy in this action exceeds the sum of five hundred dollars ($500).

2. And plaintiff further alleges that the said County of Adams, defendant, was on the 26th day of November, A. D. 1872, and for a long time prior thereto had been, a duly and legally organized county under the laws of the State of Nebraska, and that the precinct of Juniata therein was at that time, and still is, one of the legal subdivisions of said County of Adams, defendant, and that on said 26th day of November, 1872, the said defendant county did cause to be issued certain bonds on said Juniata Precinct, in said county, in the sum of six thousand dollars ($6,000.00) to aid works of internal improvement in said precinct, to wit, for the purpose of aiding in the construction of a public steam grist mill in said precinct, and that all of said bonds are now owned by this plaintiff, and the same are wholly unpaid.

3rd. And for a third and further cause of action plaintiff says:

3 That on the 26th day of November, 1872, at Juniata, in said county, the said defendants, pursuant to a vote of the qualified electors of said precinct of Juniata, in said county, at an election held in said precinct on the 26th day of November, 1872, did make and issue the bond of said Juniata Precinct, dated on said day, at said place, whereby, for value received, said precinct promised to pay, eighteen years from date, to George W. Moore, or bearer, five hundred dollars, at the National Park Bank, in

the city of New York, with interest, payable semi-annually, at said bank, at the rate of ten per cent. per annum, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 1; that attached thereto was among others a certain coupon bearing date on the day and at the place aforementioned, made by said defendants, whereby the said precinct promised to pay the bearer thereof twenty-five dollars, two and one-half years from the date thereof, to wit, on the 26th day of May, 1875, being for the interest then and there to be due on said bond, which coupon is in words and figures as follows:

$25.] JUNIATA, *Nov.* 26, 1872.

Juniata Precinct, in the County of Adams, in the State of Nebraska, promises to pay the bearer twenty-five dollars two and one-half years from date, being for six months' interest on bond No. 1.

E. M. ALLEN,
President Board Co. Com.

R. D. BABCOCK, *Clerk.*

Payable at the National Park Bank in New York City.

That before said coupon by its terms became due and payable, the said bond, together with said coupon, came to and for value became the property of this plaintiff, who thereupon became, and has ever since been, and still is the true and lawful holder thereof; that when said coupon by its terms became due and payable the same was duly presented at
4 the place of payment therein mentioned and payment demanded, but refused because said precinct had not nor did it ever have any funds in said place; that the said plaintiff has often, and in a friendly manner, applied to the treasurer of said Adams County, Nebraska, to pay said coupon, but payment has been refused, notwithstanding the said precinct is justly indebted thereon to this plaintiff in the full sum of twenty-five dollars, with interest from the 26th day of May, 1875.

Wherefore plaintiff prays judgment against the said defendants for the sum of three thousand dollars, together with interest thereon from date of maturity of the several coupons above set forth, to wit, on the sum of three hundred dollars from the 26th day of May, 1875; on the sum of three hundred dollars from the 26th day of November, 1875; on the sum of three hundred dollars from the 26th day of May, 1876; on the sum of three hundred dollars from the 26th day of November, 1876; on the sum of three hundred dollars from the 26th day of May, 1877; on the sum of three hundred dollars from the 26th day of November, 1877; on the sum of three hundred dollars from the 26th day of May, 1878; on the sum of three hundred dollars from the 26th day of November, 1878; on the sum of three hundred dollars from the 26th day of May, 1879, and on the sum of three hundred dollars from the 26th day of November, 1879, and costs herein.

A. H. BOWEN,
Attorney for Plaintiff.

Thereupon, afterwards, to wit, on the 1st day of June, 1881, a demurrer was filed in said case, which said demurrer is in words and figures following, to wit:

5 *Demurrer.*

STATE OF NEBRASKA,
Douglas County, ss:

In the circuit court of the United States within and for the district of Nebraska.

SAMUEL OSBORNE, JR., PLAINTIFF,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA, defendant.

Comes now the above-named defendant and demurs to the second and each subsequent paragraph in said plaintiff's supplemental petition herein filed, and for cause of such demurrer alleges:

1. That it appears from the face of said paragraphs, and each of them, that the court here has no jurisdiction of the subject-matter of this action, as defendant cannot be sued for the debt of the Juniata precinct, mentioned in said petition.

2. That said paragraphs, nor either of them, do not state facts sufficient to constitute a cause of action either against said defendant or said Juniata precinct.

ADAMS COUNTY, IN THE STATE OF NEBRASKA,
By JOHN M. RAGAN,
Its Att'y, with whom is James Laird.

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

No. 48 F. Samuel Osborne, jr., vs. The County of Adams. Demurrer to supplemental petition. Filed June 1st, 1881. Watson B. Smith, clerk. J. M. Ragan, att'y for def't.

Thereupon afterwards an opinion of the honorable Elmer S. Dundy, judge, was filed in said case, which said opinion is in words and figures following, to wit:

6 SAMUEL OSBORNE, JR.,
vs.
THE COUNTY OF ADAMS.

In the circuit court of the United States, district of Nebraska.

Suit on coupons detached from precinct bonds issued to aid in the erection and construction of a steam grist mill. Demurrer to petition.

An election precinct has no corporate existence, and can neither sue nor be sued under the laws of this State.

A mandamus cannot properly issue out of the federal courts until after a claim in dispute has been reduced to judgment.

A suit can be maintained against a county to enforce the payment of a

bond voted by and issued for a precinct to aid in works of internal improvements when such bonds are authorized by law.

There is no law in this State that authorizes the precincts to vote or the county commissioners to issue bonds for and on behalf of a precinct for the purpose of aiding in the erection and construction of a steam grist mill, and bonds issued therefor are simply void.

A. H. Bowen for plaintiff; John M. Ragan for defendant.

DUNDY, *Judge:*

This suit is based upon one hundred and twenty-two coupons, each for the sum of twenty-five dollars, which were detached from a series of bonds of five hundred dollars each voted by the people of Juniata precinct, and issued for and on behalf of said precinct by the county commissioners of Adams County to aid in the erection of a steam grist mill. It is shown by the petition that on the 26th day of November, 1872, an election was held in said precinct, at which time bonds to the amount of six
7 thousand dollars were voted, and that on the same day bonds were issued in that sum for the purpose aforesaid; that the bonds and coupons were purchased by the plaintiff before due, without notice, and for a valuable consideration, and that the same are wholly unpaid.

The defendant demurs to the petition and two important questions are presented for consideration by the demurrer:

First. Has the court jurisdiction to hear and determine the matter in dispute between the parties? and—

Second. Do the facts stated in the petition constitute a cause of action and justify a recovery against the defendant, or rather against the precinct represented by the defendant?

The defendant has not seen proper to state just why the court is without jurisdiction in the premises, but I conclude that it is because of the supposed want of authority to proceed against a county to enforce the payment of a bond issued on behalf of a precinct. It is clear enough that the laws of this State authorize the qualified voters of an election precinct to vote for the issuing of bonds for specified purposes, and when properly voted they are to be issued by the county commissioners of the county in which the precinct may be situated. It is equally clear that an election precinct, formed under the laws of this State, has no corporate existence. Such a political subdivision is formed for mere convenience of voting. It cannot sue or be sued because it has no officers of its own to prosecute or defend a suit. The supreme court of this State has given an authoritative exposition of the law upon this subject, and that must be deemed conclusive until otherwise decided by the highest judicial tribunal in the land. This court, too, at the present term, has held the law to be as here stated.

Blair vs. West Point Precinct, U. S. C. C., Neb. Chandler vs. Dodge County, 10th Neb., p. 20.

8 As a general rule, when and where a right exists, the law furnishes an adequate remedy to enforce the same when it is in any way impaired or impeded. It is conceded that precinct bonds may be lawfully issued for some purposes. If that be true, it necessarily follows that a remedy must exist to enforce the payment thereof, and if the precinct itself cannot be sued, though primarily liable for the payment of the bond, then reason, it would seem, must point directly to the officers who

execute the bonds as the ones who must respond on behalf of the precinct. And more especially is this so where a mandamus cannot be issued until after a proper suit has been instituted and the claim reduced to judgment, as seems to be required by all the federal courts. Indeed, whatever may be thought or said of the propriety of sustaining an action against a county to enforce a payment of a precinct bond, the question must be regarded as no longer open to argument in this court. Ever since the decision of the case of Chandler vs. The County Commissioners of Dodge County, brought in this court, the right to sue a county, to recover on a precinct bond, has been sanctioned and upheld. This case went to the Supreme Court, where the judgment was affirmed, though the question here under consideration was not raised in the Supreme Court. The case of Blair vs. West Point Precinct, before referred to, is authority on this point.

The demurrer draws in question the validity of a precinct bond issued to aid in the erection and construction of a steam grist mill, and if the bonds from which the coupons in suit were detached cannot be upheld under the provisions of the "internal improvement law" of the 15th of February, 1869, then the bonds must fall, and this suit with them. There is no other law, or part thereof, conferring the right on electors of
9 a precinct to vote bonds for any purpose. Section 1 and section 7 of this act are as follows:

"SEC. 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement to an amount to be determined by the county commissioners of such county, or city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city; provided, the county commissioners or city council shall first submit the question of the issuing said bonds to a vote of the legal voters of said county or city in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money."

"SEC. 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such cases the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall contain a statement showing the special nature of such bonds."

The language here employed to confer the authority is, "to aid in the construction of any railroad or other work of internal improvement." Is a steam mill a work of internal improvement within the meaning of the law above quoted? The first section of the
10 act referred to specially describes railroads, and then uses the general term or phrase, "or other works of internal improvement." There is a long line of authorities which seem to settle very effectually this doctrine, to wit: That where a law or written instrument is couched in specific and definite language and special authority is conferred for doing particular things, and then a general authority so conferred must be held to relate to matters similar to the ones specially de-

scribed. Applying the principle here stated to the construction of the law under which the bonds were voted, all reasonable doubts of their validity will at once cease. It would then be equivalent to saying that bonds may be voted to aid in building railroads and other works of internal improvements of a similar nature. This would perhaps authorize the voting of bonds to aid in the construction of canals, bridges, and wagon roads as well as railroads. All these objects would facilitate the transportation of persons and property from place to place, and would promote the great objects had in view by the legislature when the said law was enacted. In giving the law this construction we do no violence to language or principle. So far as known, no court in this State has gone beyond the principle of construction here applied. It has been held in several cases that the right to erect public buildings, such as jails and court-houses, derives no support from the law before cited. See U. P. R. R. vs. Lincoln County, 3 Dillon, 300; Dawson County vs. McNamar, 10 Neb., 276; Lewis vs. Sherman County, decided at the present term of court. And this seems to be the settled law in this State. Yet in some of the authorities outside of the State court-houses and jails are held to be "internal improvements," to which public aid may be voted under laws similar to our own. But the statute law in every case where the voting of bonds is
11 specially authorized is essentially different from the one under consideration. But is is claimed that the case of Township of Burlington vs. Beaseley (iv Otto, 310), decided by the Supreme Court of the United States, is also decisive of the controversy involved in this suit. I think otherwise. Applying the same principle to both cases, we would arrive at the same conclusion reached in either. The case last referred to originated under the internal-improvement law of the State of Kansas. That law especially authorizes "counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, and other works of internal improvement." The Kansas law is much more comprehensive and liberal than the law of this State. It authorizes the voting of aid for specific purposes where our law is silent. It confers ample authority for certain purposes, while our law withholds it.

Authority is given to aid in developing water power in Kansas, but in this State the legislature has withheld the right so to do, and, so far known, no one has, until recently, seriously claimed that such a doubtful authority could be rightfully exercised under the provisions of existing law.

If the law in this State, as in Kansas, had authorized the voting of bonds to aid in developing water power and building grist mills for the purpose of supplying the public with food, then there would be no good reason why aid could not also be voted to a steam grist-mill. To develop the water power would simply be to furnish the motive power to do the business in question. The object to be gained in such case is to furnish facilities for grinding grain for the use and benefit of the interested public. This being true, there would seem to be no good reason why aid could not be voted under the Kansas law to aid in the erection of
12 a steam grist-mill. The object to be gained would be precisely the same in either case. That is, the furnishing of motive power to propel the necessary machinery accomplish the identical purpose and

produce the same result. And I apprehend it is because of this reason, the similarity of results, that brought about the decision in the Kansas case. Thus, bonds could be voted to develope the water power for the purpose stated. This authority is given in express terms. "Other works of internal improvement," in the language of the law, may all receive public aid. A water grist-mill and a steam grist-mill are similar in many respects, in fact in almost every respect except in the motive power. Both are operated for the same purpose, and both accomplish the same results. So when a water mill can be aided under the specific clause in the law, a steam mill may be aided under the general clause giving the right to aid "other works of internal improvement," for the manifest reason that it, the steam mill, is similar to the water mill specially authorized and falls within the principle of construction hereinbefore stated. There is then no inconsistency between the decision of the Supreme Court in the Kansas case and the conclusions reached in the present case.

The demurrer must be sustained.

I am authorized to say that Judge McCrary concurs in this judgment.

Thereupon afterwards, at the May term of said court, on the second day of June, 1881, the following proceedings were had in said case as appears of record on folio 144, journal G of said court.

Demurrer sustained and judgment for defendant.

SAMUEL OSBORNE
vs.
THE COUNTY OF ADAMS, STATE OF NEBRASKA.

13 This cause being heard on the demurrer to the supplemental petition of said plaintiff, the court, on consideration thereof, sustains the said demurrer, and thereupon the defendant not desiring to plead further, the court find upon the pleadings and evidence in favor of said defendant.

It is therefore considered by the court that the said defendant go hence without day and recover from said plaintiff the sum of $119.20 (one hundred nineteen and $\frac{20}{100}$ dollars), its costs herein expended.

To which ruling and judgment of the court said plaintiff by its attorney excepts.

Thereupon on said 2nd day of June, 1881, a writ of error was allowed and citation issued, of which the following are the originals:

14 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Samuel Osborne, jr., plaintiff, and The County of Adams, in the State of Nebraska, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by complaint appears, we, being willing

that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 2ond day of June, 1881.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 48, F. United States circuit court, district of Nebraska. Samual Osborne, jr., vs. The County of Adams. Writ of error. Filed June 2, 1881. Watson B. Smith, clerk.

15 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To The County of Adams, in the State of Nebraska, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Samuel Osborne, jr., is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 2d day of June, 1881.

WATSON B. SMITH, *Clerk.*

15½ STATE OF NEBRASKA,
Adams County, ss:

I hereby accept service of the within citation this 4th day of June, 1881.

JOHN M. RAGAN,
Att'y for Def't in Error.

(Indorsed:) No. 48, F. United States circuit court, district of Nebraska. Samuel Osborne, jr., vs. The County of Adams, State of Nebraska. Citation. Filed June 28, 1881. Watson B. Smith, clerk.

16 Thereupon afterwards, to wit, on the 28th day of June, 1881, a stipulation for transcript for United States Supreme Court was filed in said case, which said stipulation is in words and figures following, to wit:

Stipulation relating to transcript.

In the circuit court of the United States for the district of Nebraska.

SAMUEL OSBORNE, JR.,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF Nebraska.

It is hereby stipulated and agreed by and between the plaintiff and the defendant in the above action, by their respective attorneys, that in the compilation of the record in said cause to be filed in the Supreme Court of the United States the clerk of the circuit court be required only to send up in his transcript of the petition filed in said action the introductory count, the first count covering the first cause of action, and the prayer for relief, and that said cause shall be heard in the Supreme Court of the United States upon such transcript, with other complete record; and it is further stipulated and agreed that in said petition filed in said cause that there are one hundred and fifty-seven other causes of action and counts of the same nature, amounting in the aggregate to more than five thousand dollars.

ADNA H. BOWEN,
For Plaintiff.
JOHN M. RAGAN,
Att'y for Adams County, Nebraska.

(Said stipulation is endorsed as follows:) No. 48, F. Samuel Osborne, jr., vs. The County of Adams. Stipulation for transcript. Filed June 28, 1881. Watson B. Smith, clerk.

17 Thereupon afterwards, to wit, on the 7th day of July, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

18 Know all men by these presents that we, Samuel Osborne, jr., as principal, and Titus Babcock and Geo. T. Hutchinson, as sureties, all of Adams County, Nebraska, are held and firmly bound unto the County of Adams, in the State of Nebraska, in the full and just sum of five hundred dollars, to be paid to the said County of Adams certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 30th day of June, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court, between Samuel Osborne, jr., plaintiff, and the County of Adams, in the State of Nebraska, defendant, judgment was rendered against said plaintiff, and the said plaintiff having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff shall prosecute said writ of error to effect, and answer costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL OSBORNE, JR.,
By A. H. BOWEN,
TITUS BABCOCK.
GEO. T. HUTCHINSON.

Approved by—

(Indorsed:) No. 48, F. United States circuit court, district of Nebraska. Samuel Osborne, jr., vs. The County of Adams, in the State of Nebraska. Bond. Filed July 7th, 1881. Watson B. Smith, clerk.

19 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to eighteen, contain true and faithful transcripts from the pleadings and proceedings of record and on file in my office as said clerk in the case of Samuel Osborne, jr., vs. The County of Adams, in the State of Nebraska, and that a copy of the writ of error and citation have been lodged, and the same remain on file in my said office.

Witness my hand and the seal of said court, at Omaha, this 23rd day of July, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsed:) Supreme Court of the United States. Samuel Osborne, jr., vs. The County of Adams, in the State of Nebraska. Petition in error. Filed Sept. , 1881. A. H. Bowen, att'y for p't'ff.

20 *Petition in error.*

In the Supreme Court of the United States.

SAMUEL OSBORNE, JR., PLAINTIFF,
vs.
THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA, DEFENDANT.

The plaintiff complains of the defendant for that at the May term of the circuit court of the United States for the district of Nebraska, to wit, on June 2, 1881, of said term, the defendant herein recovered a judgment against the plaintiff herein in said circuit court of the United States for the district of Nebraska for the sum of one hundred & nineteen & $\frac{20}{100}$ dollars ($119.20) costs of suit in an action pending in said court, wherein the said Samuel Osborne, jr., was plaintiff, and the said County of Adams, in the State of Nebraska, was defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff alleges that there is error in said proceedings in this:

1st. That the court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

2d. That the said judgment was given for the said defendant when it ought to have been given for the said plaintiff, according to the law of the land.

The said plaintiff therefore prays that the said judgment may be reversed, and that he may be restored to all things he has lost by reason thereof, and for such other relief as justice may require.

A. H. BOWEN,
Att'y for Plaintiff.

(Indorsement on cover:) No. 577. Samuel Osborne, jr., plaintiff in error, vs. The County of Adams, in the State of Nebraska. Nebraska C. C. U. S. Filed September 23, 1881.

1618

OFFICE SUPREME COURT U.S.
FILED
OCT 21 1882
JAMES H. McKENNEY, CLERK.

In the Supreme Court of the United States.

SAMUEL OSBORN,

Plaintiff in Error,

vs.

THE COUNTY OF ADAMS, IN THE STATE OF NEBRASKA,

Defendant in Error.

ADNA H. BOWEN,
JOHN H. AMES,
Attorneys for Plaintiff in Error.

STATE JOURNAL CO., Blank Book Manufacturers and Printers, Lincoln, Neb.

IN THE SUPREME COURT

OF THE

UNITED STATES.

SAMUEL OSBORN,
Plaintiff in Error,

vs.

THE COUNTY OF ADAMS,
IN THE STATE OF NEBRASKA,
Defendant in Error.

STATEMENT OF CASE.

On the 26th day of November, 1872, the County Commissioners of Adams county, Nebraska, issued the bonds of Juniata Precinct, a legal subdivision of said county, in the sum of six thousand dollars, to aid in the construction of a public steam grist mill in said Juniata Precinct, pursuant to a vote of the qualified electors in said precinct at an election held therein on said 26th day of November, 1872. Said bonds being issued under the provisions of an act of the legislature approved February 15, 1869, and entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose."

Section 1 of said act is as follows:

Section 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the County Commissioners of such county, or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city; *Provided*, The County Commissioners or City Council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, (1866) for submitting to the people of a county the question of borrowing money.

Section 6 of said act is as follows:

Section 6. Any county or city which shall have issued its bonds in pursuance of this act, shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled by *mandamus*, or otherwise, to levy the tax herein provided to pay the same.

The remainder of the act, with the exception of section 7 thereof, which is hereinafter quoted, provides for the manner of submitting the propositions and ascertaining the result, and is not conceived to have any bearing on this case.

This action was brought to recover on certain coupons from bonds issued by Juniata Precinct, in Adams county, to aid in the construction of a certain public steam grist mill to be erected and maintained in said precinct, and was upon demurrer determined in favor of the defendant.

I.

It is contended, and the judgment of the Circuit Court is based solely on the proposition, that because *counties* and *cities* are au-

thorized by the statute "to issue bonds to aid in the construction of any railroad or other work of internal improvement," that therefore the words "or other work of internal improvements," are to be treated as general words, and their meaning limited by construction to works of like special nature as railroads, to wit.: roadways, bridges, canals, facilities for travel and commerce.

That the Supreme Court of Nebraska does not consider the rule of construction alluded to as governing, or even being applicable in the construction of this section, is evident from the fact that when called upon to define the phrase in question in U. P. R. R. vs. Commissioners Colfax county, 4 Neb. 450–456, they make no allusion to this rule, but seek a definition as though the phrase stood alone, quoting with approval from Mayor of Wetumpka vs. Newton, 23 Ala., 660, the following: "Where works of internal improvement under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefited, are intended." If this rule could be invoked the foregoing definition would be both inadequate and misleading.

II.

But we think that even if the rule were to be applied it would not sanction so narrow a construction of the Statute as that put upon it by the Circuit Court. It is another rule, of equal force, which is not to be made to yield to this, that "in giving construction to a Statute, we must, if possible, give effect to all the several parts. No section, clause, or word shall be rejected as meaning less or superfluous, if it can reasonably be avoided. But we shall take into account the object of the enactment and the language employed in its *plain*, *ordinary*, and *popular sense*."

Hagenbuck vs. Read, 3 Neb., 24.

This rule "is but a rule of construction to enable the court to ascertain the intention of the legislature, and when that intention is apparent, can no more be allowed to govern in the exposition of penal than any other Statutes." And "general words in a statute are to receive a general construction, unless there is something in it to restrain them."

Foster vs. Blount, 18 Ala., 687.
Forrance vs. McDougal, 12 Ga., 526.
Jones vs. Jones, 18 Me., 308.
Woodworth vs. State, 26 O. S., 196.

The case last above cited is especially in point, because the structure of the Statute was exactly like that of the one under consideration. The enactment was "That if any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable, *or other officer*, in the execution of his office, the person so offending, upon conviction thereof, shall be fined," etc. The defendant was indicted and convicted under this Statute for resisting a road supervisor, and sought to set aside the conviction, claiming that the words "or other officer," should be restrained by construction so as to include only those officers belonging to the particular class or classes designated by the preceding words of particular description. But the court held otherwise. "A supervisor," says the opinion, "is completely within the ordinary meaning of the words, 'or other officer,' and must be held to be within their sense as used in this Statute, unless it be shown by the context that the legislature did not intend to include such officer.

III.

Is it not evident that the legislature did not intend to use the words in a restrictive sense, but the opposite? For the purpose of determining this question we may properly refer to the title of this act:

Beard et al. vs. Rowan, 9 Peters, 301–317.
Garrigus vs. Board Commissioners, 39 Ind., 66.

The title of this act is "To enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose." Nothing is here said which indicates an intention to confine the operation of the Statute to railroads and like means of inter-communication, and it is to be observed that in the body of the Statute the disjunctive and not the conjunctive particle is used. The language is, "or other work of internal improvement." That is to say, the particular work mentioned or any other. This appears to us, in the language of the Nebraska court, to be "the plain, ordinary, and popular meaning." Again the language is, "*any* railroad, or other work of internal improvement." What is the force of the word "*any*," if it be not to expressly include all works of internal improvements? Would it not be a correct grammatical construction of the sentence to write, "to aid," etc., "any railroad or any other work of internal improvement?" Would it not be incorrect to write, as the opinion of the Circuit Court would require us to do, "to aid," etc., "railroads and other works of internal improvements of like nature?" Not only the word "any"

but the singular form of the word "work" renders the latter meaning inadmissible.

IV.

And it is a rule in the interpretation of Statutes that the law is to be the best expositor of itself. Every part of it is to be taken into view for the purpose of discovering the mind of the law giver.

People ex rel. vs. Weston, 3 Neb., 323, 324.

And within this rule the very section of this act, upon which the plaintiff's claim is based, negatives the idea that the restriction claimed was intended by the law makers. This section, which is the sole authority for precincts to vote aid, is in the following words:

Section 7. Any precinct in any organized county in this state shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the County Commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds.

This is the whole of the grant of power to precincts, and nothing is here said about railroads or commercial facilities, but the most

general language is used. Will it be said that a more enlarged power is conferred upon precincts than upon counties and cities? If so, we will be content. But we prefer to say that here is indubitable evidence that no restriction was intended upon either body. Is it not a more reasonable supposition that the legislature specified railroads for the purpose of certainly including them, than that they intended thereby to exclude other internal improvements?

V.

If the foregoing conclusions are justified then it only remains to determine whether a steam grist mill is a work of internal improvement.

This question seems to be set at rest, at least so far as this court is concerned, by the *Township of Burlington v. Beasley*, 4 Otto, 313, where, in construing the laws of Kansas, the following emphatic language is used: "A mill run by water is declared to be an internal improvement by the statute we are considering. A ferry falls within the same principle, and so does a steam mill. It would require great nicety of reasoning to give a definition of the expression internal improvement which would include a grist mill run by water and exclude one operated by steam; or which would show that the means of transportation were more valuable to the people or Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad, while they are refused the means of grinding their wheat."

VI.

If it is sought to elude the force of this reasoning by saying that the words "water power" are not contained in our statute as

they are in the Kansas statute, the answer is, that legislation now in force and existing at the time of the enactment of the statute, rendered such use unnecessary. Sections 23, 24, 25, 26, and 29, of chapter 36, of the Revised Statutes of 1866, are as follows:

"SEC. 23. All mills within this territory now in operation, or which hereafter may be put in operation, for grinding wheat, rye, or corn, or other grain, and which shall grind for toll, shall be deemed public mills."

"Sec. 24. The owner or occupier of a public mill within this territory shall grind the grain brought to his mill as well as the nature and condition of his mill will permit, and in due time, as the same shall be brought."

"Sec. 25. The owner or occupier of every public mill shall cause a statement of the rates of toll by him charged for grinding and bolting the different species of grain to be posted in at least two conspicuous places within the mill, and such statement shall either be written or printed in a plain and legible manner."

"Sec. 26. He shall keep in his mill an accurate half-bushel measure, and an accurate set of toll dishes."

* * * * * *

"Sec. 29. Any owner or occupier of any public mill may, by giving thirty days notice in writing, change such mill into a private one. Such notice shall be posted on the mill, and in at least two other conspicuous places within the county. *Provided, however*, That such mill shall no longer grind for toll after the expiration of the date of such notice."

Appropriate penalties are denounced for the violation of any of the regulations prescribed in the statute, and provision is made for

the aiding of mill owners, and persons desiring to become such, by the exercise in their behalf of the right of eminent domain.

This statute was amended and re-enacted by an act entitled "An act relating to mills and mill dams," enacted in 1873, by which, however, the foregoing provisions were left unchanged, except that the following proviso was added to ~~said~~ section 38: "*Provided further, that no party shall change his mill to a private mill until fully reimbursing all parties who have assisted in its erection.*" And the supreme court of Nebraska, in Nosser v. Seeley, 10 Neb., 460, recently fully recognized and enforced this statute respecting the exercise of the right of eminent domain.

VII.

Now we think the character imparted to these institutions by this statute brings them clearly within the definition given in Burlington v. Beasley, *supra.* and Loan Association v. Topeka, 20 Wal., 655.

Further confirmation of this view, if needed, may be found in the proposition laid down in Guernsey v. Burlington, 4 Dillon, 375, where the court, citing and approving Leavenworth County v. Miller, 7 Kansas, 323, says: "In that case the court say, 'no instance can be shown where the government may aid a thing by power of eminent domain which it cannot aid by taxation.'"

To the same effect see, also, People v. Smith, 21 N. Y., 575, and especially the opinion of Hon. Rufus P. Tapley, in "the opinion of the judges," in 58 Maine, 614–618.

Cooley's Constitutional Limitations, 670 and note.
Barkhurd v. Brown, 25 Ill., 540.
Olmstead v. Camp, 33 Conn., 551.

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Barkhurd v. Brown, 25 Ill., 540.
Olmstead v. Camp, 33 Conn., 551.

Tyler v. Beecher, 44 Vt., 648.
Loughbridge v. Harris, 42 Ga., 500.
Chicago & C. R. R. Co. v. Lake, 71 Ill.
Watch Work Co. v. Borkhart, 41 Ind., 364.

VIII.

This court has held also that, "in construing a *statute* aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted." Platte v. U. P. R. R. Co., 9 Otto, 48. It is therefore proper to consider that in the settlement of a new country one of the great hindrances is the difficulty of erecting and maintaining mills, and the legislature saw fit to sanction the aiding of these enterprises, both by the power of eminent domain and by taxation, taking such precautions as they saw fit to secure to the public the benefits desired. That the expedience of this legislation has not ceased is evidenced by the fact, which may be proved by reference to any of the published market reports; that while the price of grain in Nebraska is commonly as low as 20 cents per bushel for corn, and 75 cents per bushel for wheat, yet the facilities for manufacturing flour and meal are still so inadequate for the demands of home consumption that the cost of these commodities when imported from abroad governs the market for the domestic product.

IX.

Statutes in *pari materia* are to be construed together, so that the whole policy of the legislature may be ascertained. The subject matter of both "the mill act" and "the internal improvement act" is the same, to-wit: "Internal improvements."

United States v. Collier, 3 Blatchf., 325.
The Harriet, 1 Storey, 251.
Bruce v. Schuyler, 9 Ill., 221.
Manuel v. Manuel, 13 Ohio, 458.

X

An objection is made to the jurisdiction, which we think is properly disposed of by the opinion of the circuit court:

It is held by the supreme court of Nebraska, State v. Dodge County, 10 Neb., 20, that "precincts in this state are mere territorial divisions or districts, created for certain political and administrative purposes, and without semblance of corporate character," therefore that they cannot be sued, and that the only remedy for the collection of their bonds is by mandamus to the county commissioners, to compel them to levy and collect a requisite tax. It is, we believe, the uniform doctrine that the Federal courts will not issue a mandamus to an officer holding under state authority, except to collect or enforce obedience to their judgments and orders. The consequence is that the plaintiff is barred of all remedy in the Federal courts, unless it be by action brought in the manner in which this was begun. The sole object of this suit, as we suppose, is to determine the validity of the supposed obligation, and to fix its amount, neither of which is it necessary to do when resort is had to the state courts, or rather, both of which are done in the state courts upon the hearing of the application for a mandamus. Thereafter the procedure in both tribunals is the same. The same process issues to the same officers, commanding them to do the same things, and obedience is enforced thereto in the same

manner; so that, after all, the objection appears to be to the form only, and to have no relation to any substantial right. It will be observed, too, that section 6 of the act above quoted gives a remedy "*by mandamus or otherwise.*" Is it not absurd to say that a political subdivision is sufficiently incorporate to make a contract and not sufficiently incorporate to be sued on the same at its maturity?

For these reasons we think the judgment of the circuit should be reversed and the cause remanded for trial.

ADNA H. BOWEN,
JOHN H. AMES,
Attorneys for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

SAMUEL OSBORNE, Jr.,
Plaintiff in Error,
vs.
THE COUNTY OF ADAMS, In the State of Nebraska,
Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

JOHN DONIPHAN and **JOHN M. RAGAN,**
Attorneys for Defendant in Error.

DEMOCRAT PRINT.

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I.

The Revised Statutes of Nebraska, 1866, page 278, sec-1, provides:

"Each Board of County Commissioners may divide the county into convenient precincts; and, as convenience may require, erect new ones, subdivide precincts already established and alter precinct lines."

The same statute, page 136, section 1. provides:—inter alia—"For each precinct (there shall be elected), two justices of the peace and two constables, in the year 1867, and every two years thereafter; one assessor, three judges and two clerks of election, shall be elected in the year 1866 and annually thereafter."

Laws of Nebraska, 1869, page 92, section 7, provides: "Any precinct in any organized county in this state shall have the privilege of voting to aid works of internal improvement,

and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue Special Bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but SHALL CONTAIN A STATEMENT SHOWING THE SPECIAL NATURE OF SUCH BONDS."

Laws of Nebraska, 1869, page 92, section 6, provides: "Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county may be compelled, by mandamus, or otherwise, to levy the tax herein provided to pay the same."

The above are all the statutes in force in reference to precincts when the bonds in controversy were issued. From these it appears that a precinct in the state of Nebraska is a "mere territorial division created for certain political and administrative purposes," but without corporate character or powers; hence cannot sue or be sued at law. Its only officers are justices of the peace, constables, an assessor and judges and clerks of election. The power of a county or city to make contracts, to sue and be sued, is derived from express statute. There is no law in the State of Nebraska conferring any such powers on a precinct. Hence, the remedy of the plaintiff in error is not a suit at law, but mandamus, to compel the proper officers to levy a tax to pay these bonds.

State ex-rel. Chandler vs. Board of County Commissioners of Dodge County, 10 Neb., 20.

These bonds are SPECIAL BONDS "and on their face show their SPECIAL NATURE." A purchaser of such securities should not complain if the legislature, in conferring authority on an unincorporated division of territory to vote bonds, in the same act prescribed and limited the remedy for the collection of such bonds.

Wells vs. Supervisors, 102 U. S., 625.
Ogden vs. Davis County, 102 U. S., 634.

II.

But if the Court should be of opinion that the doctrine laid down by the Supreme Court of Nebraska, in State ex-rel. Chandler, vs. Board of Co. Com'rs, Dodge Co., 10 Neb., 20, is untenable, and that the permission given by the legislature to the precinct to vote SPECIAL BONDS carried with it the liability of the precinct to be sued AT LAW on such bonds; if

"it is absurd to say that a political subdivision is sufficiently incorporate to make a contract and not sufficiently incorporate to be sued on the same at its maturity," then, why was not this suit brought against Juniata precinct? The contracts declared on are not those of the defendant in error. It is not an endorser, neither a guarantor—why should it be sued and subjected to costs in this case? The petition does not state a cause of action against it. On what principle or authority, or by what rule shall A be sued at law on the written contracts of B, without some averment in the declaration showing that A is liable on such contract?

III.

A steam grist mill is not a work of internal improvement within the meaning of Sec. 1, Page 92, Laws of Nebraska, 1869. It reads: "Any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction

of any RAIL ROAD or other work of INTERNAL IMPROVEMENT, etc."

Plaintiff in error, cites Township of Burlington vs. Beasley, 4 Otto, 313, as in point here. That case, however, is a construction of a Kansas statute in these words: "The Board of County Commissioners * * * is (are) hereby empowered to issue bonds * * * for the purpose of building BRIDGES, free or otherwise, or to aid in the construction of RAIL ROADS or WATER POWER * * * or other works of INTERNAL IMPROVEMENT."

Laws of Kansas, 1872, Page 110, Sec. 1.

This statute expressly authorized the issue of bonds to build a mill; and as we understand it the case in 4 Otto supra,

turned on the point whether a STEAM mill was within the act.

We submit that the meaning of the phrase, "other works of Internal Improvement," in the Nebraska statute is limited by the term "Rail Roads." That is, that bonds might be issued to aid—not ANY work of Internal Improvement—but works of the same character as Rail Roads, such as Canals, Turnpikes and Bridges.

In the Kansas statute the phrase, "other works of Internal Improvement," was limited by the terms, "Rail Roads" and "Water Power." This would include not only bridges canals and turnpikes, but mills and manufacturing establishments; and the case cited in 4 Otto does not enlarge this rule, but decides that it makes no difference what the MOTIVE POWER is so that the improvement is within the statute.

The statute is the only authority for issuing the bonds and if the improvement is not within it the bonds are void.

Guernsey vs. Burlington Township, 4 Dil., 372.

A grist mill is no more within the Nebraska statutes than an opera house. Surely not within it if a COUNTY COURT HOUSE is not, and the Supreme Court of Nebraska, in construing this very statute decided that a Court House was not within it.

Board County Commissioners Dawson County vs. McNamar, 10 Neb., 276.

In the construction of the statute of a state this court will follow the construction placed on such statute by the highest court of the state.

Walker vs State Harbor Commissioners, 17 Wall,

Paine et al., vs. Wright et al., 6 McLean. (U. S. S. C.,) 395.

The record shows that the bonds were issued to aid a private enterprise though incidentally beneficial to the public.

If it was for a private purpose the power did not exist. This is the doctrine of every state where the matter has been considered.

Freeland vs. Hastings, 10 Allen, 570.

Justice Strong has fully stated the doctrine in

Olcott vs. Supervisors, &c., 16 Wall., 678.

And the learned Judge clearly shows that the taxing power cannot be resorted to for private purposes.

Commercial Bank vs. Iola, 2 Dillon, 353, discusses the same question, and it is there declared that all attempts to aid pri-

vate enterprises is outside the legislative power. To the same effect are:

Allen et al vs Inhabitants of Jay, 60 Me., 124.
Opinion of the Judges, 58 Maine, 590---603.
Lowell vs City of Boston, 111 Mass., 454.
Loan Association vs Topeka, 20 Wall, 655---664.

Section four (4) art. eight (8) of the Constitution of Nebraska, in force when these bonds were issued, reads as follows: "The Legislature shall provide for the organization of cities and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such powers."

In the face of this proviso, showing as it does the jealousy of the people as to taxation and abuse of public credit, it is contended that because the Legislature of Nebraska regulated tolls to be taken by grist mills, therefore, the courts should—within the meaning of the Nebraska statute—hold them to be, not private enterprises, but works of a public character, like bridges and railroads. With equal propriety it may be claimed that the importation of blooded cattle is a public improvement because the law regulates their running at large; or opera houses because the law prescribes that their doors shall open outward; or PUBLIC INNS (hotels) because the law requires them to provide for all who come, and the Civil Rights Bill, that no person on account of race, color, &c., shall be denied the privileges of either.

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